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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 529

EARL M. OWENS,

Petitioner,

v.

JOHN P. TRAYNOR, DEPUTY COMMISSIONER,
UNITED STATES DEPARTMENT OF LABOR
AND
BETHLEHEM STEEL CORPORATION,

Respondents.

BRIEF IN OPPOSITION
of
BETHLEHEM STEEL CORPORATION

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The Court of Appeals for the Fourth Circuit affirmed a judgment in favor of John P. Traynor, Deputy Commissioner, U. S. Department of Labor and Bethlehem Steel Corporation, which was entered by the District Court for the District of Maryland affirming an award of the Deputy Commissioner rejecting the claim of Earl M. Owens for compensation benefits for permanent partial disability under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 and following (the Act).

Earl M. Owens now seeks a writ of certiorari for the purpose of reversing the judgment entered below. This brief is filed on behalf of the Bethlehem Steel Corporation which is one of the respondents opposing the grant of the Writ.

Opinions

The opinion of the Court of Appeals filed on June 19, 1968 is printed in 396 F. 2d 783 and is printed on pp. 16-17 of the Appendix to Petitioner's brief. The District Court filed an opinion and a supplemental order, printed on pp. 7-15 of the Appendix to Petitioner's brief and is reported in 274 F. Supp. 770.

Statement of the Case

Earl M. Owens (hereinafter referred to as "claimant") sustained an injury to his back in the course of his employment by Bethlehem Steel Corporation (hereinafter referred to as "Bethlehem"). Claimant filed a claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act claiming both temporary and permanent disability resulting from the injury he sustained. There is no dispute that the employment was covered by the Act or that he was entitled to benefits awarded him for temporary total disability. He also claimed permanent partial disability benefits contending that, as a result of the injury, he had sustained a permanent loss of wage-earning capacity, which entitled him to benefits under what is known as the "Other Cases" section of the Act as amended. This claim was disputed by Bethlehem.

After a hearing, John P. Traynor, the Deputy Commissioner, passed an award making a finding of fact that the claimant had no loss of wage-earning capacity, and added that he had sustained a physical injury permanent in

nature and that there was a reasonable probability that his injury might worsen. He then attempted to keep the claim open indefinitely to see what might happen.

On the claimant's appeal, the case was sent back to the Deputy Commissioner with instructions that, if he meant by his award that, taking all factors into consideration, he found the claimant's injury resulted in no loss of wage-earning capacity but that he would like to keep the case open indefinitely in case his finding might prove to be wrong, he should disallow the claim. By his second award, the Deputy Commissioner stated that he had found, as a fact, that the claimant had sustained no loss of wage-earning capacity. Since, under the above decision, he could not keep the claim open indefinitely, he rejected the claim for benefits. From this subsequent award, the claimant asked for a review by the District Court for the District of Maryland which, after a second review of the record, within the limits of *O'Leary v. Brown Maxon, Inc.*, 340 U.S. 504, affirmed the award. This judgment of the District Court was affirmed by the Court of Appeals after it had also reviewed the record.

Statutes

33 U.S.C.A. 902

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C.A. 908

(c) Permanent partial disability: In case of disability partial in character but permanent in quality * * * as follows:

(21) Other cases: In all other cases in this class of disability the compensation shall be 66-2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

33 U.S.C.A. 908

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * * *

33 U.S.C.A. 921

* * * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). * * *.

33 U.S.C.A. 922

22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

Argument

In substance, the claimant's contention in this case is that, when an employee has sustained a permanent partial injury, which is causing neither loss of earnings nor, considering all factors, any loss of wage-earning capacity, but which might at some time in the future get worse and then, in its worse condition, cause a loss of earning capacity, he is entitled to an immediate award for permanent disability benefits under Sec. 908(c)(21) of the Act. His contention is that such possibility automatically constitutes a finding that he has sustained a present loss of wage-earning capacity. This contention is based on a misreading of Sec. 908 (h) of the Act and of the holding of the Court of Appeals for the Second Circuit in *Travelers Insurance Company v. McClellan*, 288 F. 2d 250 (1961).

Section 908(h) says that if the actual wages of a claimant do not fairly and reasonably represent his wage-earning capacity, the Deputy Commissioner, in determining whether a claimant has lost any wage-earning capacity, may consider not only the natural future effect of the injury on his ability to work but also the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances which may affect his capacity to earn wages in his disabled condition.

In *Welch v. Leavey*, 397 F. 2d 189 (5th Cir. 1968), a disallowance of a claim for benefits under the "Other Cases" section was affirmed even though there had been a finding of medical disability. As the court (Thornberry, J.) there pointed out, the *McClellan* case only held that an award of a Deputy Commissioner for benefits for permanent partial disability under the "Other Cases" section could not be enjoined when there was evidence that the claimant had a present physical limitation in his work ability, as well as pos-

sible future aggravation, merely because he was earning as much as he had made before the accident. It did not hold that, just because of a possible future physical worsening of a claimant's injury, there must be a finding that his wage-earning capacity was lessened. *McClellan* did not hold that the Deputy Commissioner could not find that a claimant had no loss of wage-earning capacity when in addition to possible future aggravation of physical injury, he considered all other factors such as the claimant's education, the nature of his work, his ability to perform it, the physical effort required in his work, the actual physical activities the claimant could perform without any deleterious effect on his condition and the after-injury earnings.

Unless this Court desires to review the record to determine whether there was substantial evidence to justify the factual finding that the claimant had no loss of wage-earning capacity, which record has been reviewed and finding affirmed by the District Court and by the Court of Appeals, no purpose would be served by granting a writ in this case.

Conclusion

Since the petition is based on a misunderstanding of the record, it should be denied.

Respectfully submitted,

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JOSEPH H. YOUNG,

Attorneys for Respondent,
Bethlehem Steel Corporation.